

Toh Seak Keng v Lim Huang Cheow & Ors
(Toh Seow Ngan & Ors, Interveners)

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D4-22-295-86
VC GEORGE J
24 APRIL 1992

Civil Procedure — Judgments and orders — Orders not perfected — Party not complying with order on ground that it had not been perfected — Party also seeking remedy based on breach of order by other party — Whether party estopped from doing so

Civil Procedure — Judgments and orders — Variation — Consent order — Whether order may be varied

Civil Procedure — Judgments and orders — Consent order — Repudiation by one party — Right of other party to a discharge from performing obligations under order — Principles applicable

The interveners were the registered owners of certain shares. The Supreme Court had held that a consent order for the sale of the shares to the respondents was not binding on the interveners and ordered that the shares be returned by the respondents to the interveners upon payment by the interveners of the agreed value of the shares. The interveners did not pay the money when requested by the respondents, saying that the order of the Supreme Court had not been perfected. Later, on the application of the respondents, a consent order was made on 14 August 1990 by which the interveners were given seven days to pay the money, failing which the respondents were to be at liberty to deal with the shares as they deemed fit. A draft of the consent order was approved by the solicitors for the interveners. Before it could be perfected, the interveners' solicitors filed an application seeking a variation of the consent order so as to give the interveners a further 30 days or so to pay the money. At that stage, the interveners had not realized that on 22 August 1990 the respondents had transferred the shares to third parties in the mistaken belief that the seven day period had expired on 21 August 1990. It was an admitted fact that the interveners and their legal advisers too had believed at that stage that the period had expired. On or about 26 September 1990, the interveners and their solicitors realized that because of O 3 r 2(5) of the Rules of the High Court 1980, the interveners had in fact a further two days from 21 August 1990 to pay the money. Confirmation of this was obtained by a ruling of the court. The interveners then filed an application seeking a declaration that because the respondents had disposed of the shares before they were entitled to do so the time fixed for the interveners to pay the money was suspended. They also sought a consequential order that the court fix a new date for the payment of the money.

At the hearing of the two applications made by the interveners, it was contended for them that as the consent order had not been

A perfected, it was open to the court to reconsider it and vary it. The interveners also relied on the respondents' anticipatory breach of the terms of the consent order in asking the court to hold that the interveners were thereby discharged from their obligation under the order.

B **Held**, dismissing the applications:

- (1) It was not open to the interveners on the one hand to say that there had been a breach of the terms of the order and on the other hand to call to aid the fact that it had not been perfected. An estoppel of sorts arose to preclude the interveners from doing so.
- C (2) Since the order made was a consent order the general rule is that it may be varied only by consent of the parties. However, there are exceptions to the general rule, the courts having reserved to themselves a measure of control over its own orders, even consent orders. In the instant case the interveners had failed to prove that the consent order was made under a mistake.
- D (3) The right to a discharge on repudiation by one party is based on the principle of the other party being the innocent party. However, where that party in fact is unable or unwilling to carry out his part of the bargain it cannot be said that he is the innocent party. The interveners were not in a position to say and did not say that at the relevant times they were or would have been capable of and ready and willing to perform their obligations under the terms of the consent order.
- E

[Bahasa Malaysia summary]

- F Si pencilah adalah tuan punya berdaftar saham yang tertentu. Mahkamah Agung telah memutuskan bahawa suatu perintah persetujuan untuk penjualan saham itu kepada penentang tidak mengikat si pencilah dan memerintahkan bahawa saham itu dikembalikan oleh penentang kepada si pencilah atas pembayaran oleh si pencilah akan nilai yang dipersetujui bagi saham itu. Si pencilah tidak membayar wang itu apabila diminta oleh penentang, mengatakan bahawa perintah Mahkamah Agung itu tidak disempurnakan. Kemudian, atas permohonan penentang, suatu perintah persetujuan telah dibuat pada 14 Ogos 1990 dengan mana si pencilah diberi tujuh hari untuk membayar wang itu, sekiranya tidak terjadi penentang bebas membuat urusan dengan saham itu sebagaimana mereka anggap sesuai. Suatu draf perintah persetujuan telah diluluskan oleh peguamcara si pencilah.
- G Sebelum ianya boleh disempurnakan, peguamcara si pencilah telah memfailkan suatu permohonan meminta suatu perubahan perintah persetujuan itu supaya memberi si pencilah lebih kurang 30 hari tambahan untuk membayar wang itu. Pada peringkat itu, si pencilah belum sedar bahawa pada 22 Ogos 1990 penentang telah memindah saham itu kepada pihak ketiga kerana tersilap percaya bahawa masa tujuh hari itu telah tamat tempohnya pada 21 Ogos 1990. Adalah fakta yang diterima bahawa si pencilah dan penasihat undang-undang
- H
- I

mereka juga telah mempercayai pada peringkat itu yang masa itu telah
tamat tempohnya. Pada atau kira-kira pada 26 September 1990, si
pencelah dan peguamcara mereka sedar bahawa kerana A 3 k 2(5)
Kaedah-Kaedah Mahkamah Tinggi 1980, si pencelah sebenarnya
mempunyai dua hari selanjutnya daripada 21 Ogos 1990 untuk
membayar wang itu. Pengesahan tentang ini telah diperoleh dengan
keputusan mahkamah. Si pencelah selepas itu memfailkan suatu
permohonan meminta deklarasi bahawa kerana penentang telah
menjual saham itu sebelum mereka berhak berbuat demikian masa
yang ditetapkan bagi si pencelah membayar wang itu telah
ditangguhkan. Mereka juga memohon perintah berbangkit bahawa
mahkamah menentukan tarikh baru untuk pembayaran wang itu.

Pada pembicaraan kedua-dua permohonan yang dibuat oleh si
pencelah itu, telah diujahkan bagi pihak mereka bahawa kerana
perintah persetujuan itu belum disempurnakan, ianya terbuka kepada
mahkamah untuk mempertimbangkannya semula dan mengubahnya.
Si pencelah juga bergantung kepada kemungkiran dalam jangkaan
penentang akan terma perintah persetujuan itu dalam meminta
mahkamah untuk memutuskan bahawa si pencelah oleh itu dilepaskan
daripada obligasi mereka di bawah perintah itu.

Diputuskan, menolak permohonan itu:

- (1) Adalah tidak terbuka kepada si pencelah pada satu belah untuk
mengatakan bahawa terdapat kemungkiran terma perintah itu
dan pada belah yang lain untuk menggunakan fakta yang ia belum
disempurnakan. Sejenis estoppel timbul menghalang si pencelah
daripada berbuat begitu.
- (2) Kerana perintah yang dibuat itu adalah satu perintah persetujuan,
rukun am ialah bahawa ianya boleh diubah hanya dengan per-
setujuan kedua pihak itu. Namun demikian, terdapat kekecualian
pada rukun am itu, mahkamah ada menyimpan untuk diri mereka
sedikit sebanyak kuasa atas perintahnya sendiri, biarpun perintah
persetujuan. Dalam kes ini si pencelah telah gagal membuktikan
bahawa perintah persetujuan itu telah dibuat di bawah suatu
kesilapan.
- (3) Hak untuk dilepaskan atas penolakan oleh satu pihak ialah ber-
dasarkan prinsip yang pihak yang lain itu adalah pihak yang tidak
bersalah. Namun demikian, di mana pihak itu sebenarnya tidak
boleh atau tidak rela melaksanakan peranannya dalam perjanjian
itu, tidak boleh dikatakan bahawa dianya adalah pihak yang tidak
bersalah. Si pencelah tidak berkedudukan untuk mengatakan dan
tidak mengatakan bahawa pada masa relevan itu mereka berupaya
atau pasti berupaya dan bersedia serta rela melaksanakan obligasi
mereka di bawah terma perintah persetujuan itu.]

[*Editorial Note*: The interveners have appealed to the Supreme Court
vide Civil Appeal No 03-43-92.]

A Cases referred to

1 *Ganapathy Chettiar v Lum Kum Chum & Ors* [1981] 2 MLJ 145 (refd)

2 *Australasian Automatic Weighing Machine Co v Walter* [1891] WM 170 (refd)

B 3 *Ooi Siew Yook & Ors v Lim Bar Kee* [1987] 2 MLJ 267 (refd)

4 *Purcell v FC Trigell Ltd & Anor* [1971] 1 QB 358; [1970] 3 All ER 671; [1970] 3 WLR 884 (refd)

5 *Dietz v Lennig Chemicals Ltd* [1966] 2 All ER 962; [1966] 1 WLR 1349 (refd)

6 *Mullins v Howell* (1879) 11 Ch D 763 (refd)

C 7 *Foran v Wight* [1989] ALJR 1; (1989) 88 ALR 413 (refd)

Ranjit Singh (Cheang & Ariff) for the interveners/applicants.

Derek Fernandez and S Selvarajah (Fernandez & Co) for the respondents.

D *Cur Adv Vult*

VC George J: The Supreme Court had held that the consent order obtained in respect of the sale of certain shares, the registered owners of which were the interveners, was not binding on them. The shares were to be returned by the respondents to the interveners upon payment to the respondents of the agreed value of the shares.

E The order of the Supreme Court was made on 20 April 1990. The respondents, through their solicitors, wrote to the interveners' solicitors requiring them to pay up the said value of the shares so that the shares could be delivered to the interveners. However, the interveners apparently appeared to have had some difficulty in raising the amount, which was

F some \$475,000. Apparently as an excuse for not coming out with the money they appeared to seek refuge behind the fact that the Supreme Court order had not been perfected. The respondents wanted the issue resolved for obvious reasons — if the interveners in fact did not want the shares or could not pay for them then they, the respondents, would be stuck with the shares. They did not want the issue left hanging over their heads. They

G wanted to know whether they could deal with the shares as they pleased. They wanted a dateline.

H They filed their application encl 29 in effect asking for an order that the \$475,000 be paid within seven days failing which the respondents were to be at liberty to deal with the shares as they deemed fit. When the application came up for hearing, the interveners were represented by counsel and a consent order was entered in terms of the application. This was on 14 August 1990.

I Apparently a draft order was sent for the approval of the solicitors for the interveners who duly approved it. However, before it could be perfected the interveners' solicitors on 22 August 1990 took out their application encl 32 seeking a variation of the consent order so as to give the interveners a further 30 days or so to come up with the money. At that stage the interveners had not realized that on 22 August 1990 the respondents had in

fact transferred the shares to third parties. They did this in the belief that the seven days given for the interveners to pay up the \$475,000 had expired on 21 August 1990. It is also an admitted fact that the interveners and their legal advisers themselves were at that stage also of the opinion that the seven days had expired.

On or about 26 September 1990, the interveners and their solicitors realized that because of O 3 r 2(5) of the Rules of the High Court 1980, the interveners had in fact a further two days from 21 August 1990 to pay up and that the assumption that the time given by the consent order had expired was erroneous. Confirmation of this as being the position was obtained by the court ruling that although the order had provided for the interveners to pay up 'within seven days', in effect they had nine days. However, the position that obtain on the eighth day after the order was that both parties were under the impression that the time was up. As had been seen, accordingly the respondents purported to transfer the shares thinking that they had the liberty to do so and the interveners, although they believed they were already out of time, sought by encl 32 to have the time expanded.

As soon as the interveners and/or their solicitors realized the error, they made some interesting moves. They moved the court in contempt against the respondents for dealing with the shares on the eighth day as they had done. They also filed encl 53 by which they sought a declaration that because the respondents had disposed of the shares before they were entitled to do so, the time for the interveners to come up with the money was suspended. They also sought the consequential order that the court fix a new date for the payment of the \$475,000.

Enclosures 53 and 32 came on for hearing together. I saw them as being in effect alternative prayers, viz: for the court to declare that there was a suspension of time and, if not, for the court in any event to vary the consent order by extending the time to pay up. Mr Ranjit Singh sought to make something of the fact that the order had not been drawn up. He argued that particularly as it had not been perfected, it was open to the court to reconsider it and vary it.

I do not think in the context that the 'not perfected order' point has merits in that both parties had acted as if the order had been perfected. It is not open to the interveners on the one hand to say that there had been a breach of the terms of the order as they do by encl 53 and on the other hand to call to aid the fact that it had not been perfected — I think that an estoppel of sorts arises to preclude the interveners from doing so.

Since the order made was a consent order, the general rule is that it may be varied only by consent of the parties: see *Ganapathy Chettiar v Lum Kum Chum & Ors*¹ where *Australasian Automatic Weighing Machine Co v Walter*² was applied. However, there are exceptions to the general rule, the courts having reserved to themselves a measure of control over its own orders, even consent orders. The court may in its discretion vary or alter interlocutory orders even though made originally by consent: see *Ooi Siew Yook & Ors v Lim Bar Kee*³ where Edgar Joseph Jr J found assistance in a passage in the judgment of Lord Denning MR in *Purcell v FC Trigell Ltd & Anor*⁴ at pp 363 and 364 where the order had not been drawn up. The position had

- A been restated by Lord Denning MR in *Dietz v Lennig Chemicals Ltd*⁵ at p 964:

The law is settled by a series of cases, particularly *Holt v Jesse* (1876) 3 Ch D 177 and *Harvey v Croydon Union Rural Sanitary Authority* [1881-85] All ER 1031. They show that if, before a consent order is drawn up, it appears that the consent was given under a misapprehension or from a misstatement or want of materials, then the party can come to the court and ask that it be not drawn up. Of course, he cannot come without good reason. If he seeks arbitrarily to get out of it, the court will not listen to him; but, if he has any good reason, then he can come and ask that it should not be made an order of the court, and that it be set aside.

- B
- C Jessel MR was of the opinion that at least in respect of interlocutory orders, even if perfected, the court had the discretion to discharge them. He said in *Mullins v Howell*⁶ at p 766:

I have no doubt that the court has jurisdiction to discharge an order made on motion by consent when it is proved to have been made under a mistake, though that mistake was on one side only, the court having a sort of general control over orders made on interlocutory applications.

- D ... I do not think that the rules which have been laid down as the rules under which the court will enforce agreements apply to enforcing orders of the court, because the court has jurisdiction over its own orders, and there is a larger discretion as to orders made on interlocutory applications than as to those which are final judgments.

- E In the instant case the interveners have failed to prove that the consent order was made under a mistake. The interveners also rely on anticipatory breach to ask the court to hold that they were discharged. As has been seen, admittedly in all innocence (albeit somewhat hastily) the respondents, assuming (erroneously) that they were at liberty to do so, have appeared to
- F have repudiated their obligation to be in possession of the shares so as to have them available to be transferred on completion in that they had in fact transferred the shares to a third party one day before they were at liberty to have done so.

In the judgment of the High Court of Australia in *Foran v Wight*,⁷ Dawson J said:

- G The reason why it is said that the purchasers were not entitled to rely upon the vendors' representation is that they, the purchasers, were not ready and willing to perform their obligations because they did not then have the finance to enable them to do so. Of course, the date for settlement had not arrived at the time the vendors repudiated the contract and, as will appear, it is necessary to consider the purchasers' obligation at that time with that fact in mind. But I shall return to that aspect of the matter shortly. Firstly it is necessary to settle the question whether the purchasers were under any obligation to prove, as plaintiffs, that, notwithstanding the vendors' repudiation, they were ready and willing to perform their obligations under the contract. Of course, readiness and willingness implies not only disposition, but also capacity: *De Medina v Norman* (1842) 9 M & W 820 at p 827 [152 ER 347 at p 350].
- H
- I

In any action for breach of contract, the readiness and willingness of the plaintiff to perform those mutual obligations remaining to be performed on his part under the contract is a condition precedent to his right to recover: see

Hensley v Reschke (1914) 18 CLR 452. Under the old rules a plaintiff was required to plead that he was ready and willing but under the present rules that fact is implied with the effect that he is not required to prove it unless the defendant puts it in issue. In that event the burden of proving readiness and willingness rests upon the plaintiff: see Supreme Court Rules 1970 (NSW) Pt 15, r 11.

But what if the breach is anticipatory rather than actual? The authorities have given conflicting answers to this question, but it is now clear that in cases of repudiation as well as actual breach, readiness and willingness on the part of the plaintiff is part of his cause of action. The position was clearly stated in *DTR Nominees Pty Ltd v Mona Homes Pty Ltd* at p 433:

'A party in order to be entitled to rescind for anticipatory breach must at the time of rescission himself be willing to perform the contract on its proper interpretation. Otherwise he is not an innocent party, the common description of a party entitled to rescind for anticipatory breach.'

Here the interveners admittedly were not in a position to say and do not say that at the relevant times they were or would have been capable of and ready and willing to perform their obligations under the terms of the consent order. The right to a discharge on repudiation by one party is based on the principle of the other party being the innocent party. However, where that party in fact is unable or unwilling to carry out his part of the bargain it cannot be said that he is the innocent party. Dawson J goes on in *Foran v Wight*⁷ at p 30 of the report to say that one should not

... carry too far the principle that the repudiation by one party of a contract may absolve the other party from the obligation of rendering useless performance. No doubt that principle, when it applies, may reduce the extent, or later the nature, of the readiness and willingness which a plaintiff is required to show, but there is no reason why it should eliminate the requirement entirely. A party should not be able to sue for breach if he is unable or unwilling to carry out his part of the bargain; where, in other words, he is not the innocent party. Even where a party has been absolved by the repudiating party from performing his future obligations under the contract he must show that at the time of the repudiation he was ready and willing to complete the contract had it not been repudiated.

Both the applications encl 32 and 53 have to be and are dismissed with costs.

Applications dismissed.

Reported by PS Ranjan

A
B
C
D
E
F
G
H
I